SUPREME COURT OF THE UNITED STATES.

No. 266.

ROBERT A. McTYER, PLAINTIFF IN ERROR,

vs.

EDWARD A. BULLOCK, ADMINISTRATOR OF THOMAS C. McDOWELL, DECEASED, and al.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

GIDEON, Printer, 511 Ninth Street, Washington, D. C.

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GIDEON, Print.

Be it remembered, that on the 16th day of February, A. D. 1857, the same being a day of the regular January Term, 1857, of the Supreme Court of Alabama, present and presiding as Judges of said Court:

Hon. Samuel T. Rice, Chief Justice.
Hon. Abm. J. Walker, Associate Justice.
Hon. George W. Stone, " "

There was filed in the office of the Clerk of said Court, the transcript of a record from the Circuit Court of Barbour County, in words and figures following, to wit:

THE STATE OF ALABAMA, }
Barbour County. }

Be it remembered, that an action was commenced in the Circuit Court of said county, for the recovery of lands therein mentioned, and proceedings had thereon in words and figures, as follows:

THE STATE OF ALABAMA, }
Barbour County. }

To any Sheriff of the State of Alabama: You are hereby commanded to summon Robert A. McTyer to appear at the next term of the Circuit Court for said county, at the place of holding the same, then and there to answer the complaint of Thomas C. McDowell.

Witness my hand this 24th day of February, A. D. 1853.

JOHN C. McNAB, Clerk.

THOMAS C. McDOWELL, Plaintiff, }
vs.
ROBERT A. McTYER, Defendant. }

The plaintiff sues to recover the following tract of land, to wit: The south-west quarter and the west half of the north-west quarter of section thirty-two, (32,) in township ten, (10,) of range twenty-nine, (29,) in the district of lands, subject to sale at Montgomery, Alabama, being and situate in said County of Barbour, and containing two hundred and forty acres and seventy-five hundredths of an acre, of which he was possessed before the commencement of this suit, and after such possession accrued the defendant entered thereupon, and unlawfully withholds and detains the same, together with one thousand dollars for the detention thereof.

COCHRAN & BULLOCK,
Attorneys for plaintiff.

And said summons and complaint is endorsed as follows, to wit: Received in office February 24th, 1853.

THOS. S. LOCKE, Sheriff.

Executed by leaving a copy of the within summons and complaint with the defendant, March 19th, 1853.

THOS. S. LOCKE, Sheriff.
By W. MABRY, D. S.

We, the jury, find the defendant guilty.

WM. HINSON, Foreman.

And the judgment rendered by the Court in said case, is as follows:

THOMAS C. McDOWELL
vs.
ROBERT A. McTYER. } Ejectment.

This day came the said parties and took issue on the general issue, and then a jury came, who say they find the issue for the plaintiff, and find him the premises mentioned in the declaration, and assess his damages at for the detention complained of. It is therefore considered by the Court, that the plaintiff recover of the defendant the premises and damages aforesaid, and also costs, and that writs of *fieri facias* and *habere facias possessionem*, issue.

And said cause was taken to the Supreme Court by Bill of Exceptions, signed by the presiding judge, which is as follows:

McDOWELL
vs.
McTYER. } Fall Term, 1856.

Be it remembered, that on the trial of this case, the plaintiff introduced a patent from the United States to himself for the *locus in quo*, dated April 10th, 1850, and proved that the entry was made 10th January, 1850.

The defendant, McTyer, proved that for a valuable consideration he bought the lands in question, in November, 1849, from John H. Howard, then in possession, and took immediate possession, and thence hitherto has been in possession, claiming the land as his own under Howard's title-bond, given him at the time of his purchase. Defendant further proved, that in and during the year A. D. 1833 and 1834, John Nolan and Daniel Nolan, resided on and cultivated the east half of the north-west quarter in the same section with the land sued for, and James Nolan, during said years, resided on and cultivated the east half of the south-west quarter of the same section, and that they were so residing on and cultivating their respective tracts, at the passage of the pre-emption act of

1834, and were then in possession as above stated, and that said John, Daniel, and James, within the time prescribed by law, duly applied to the proper land officers, whose duty it was to entertain such applications for leave to enter said lands as pre-emptors, and offered to pay the purchase-money, and made all necessary affidavits and proofs required to show their right of pre-emption, and to do everything preliminary to the allowance of their pre-emption right in said lands, but said officers would not permit said Nolans, nor either of them, to enter said lands, nor to prove or take any right of pre-emption thereto, or to any part thereof, assigning, as a reason for such refusal, that said lands had been reserved and set apart to Creek Indian reservees under the treaty of 1832, with the tribe of Creek Indians. Defendant further proved, that at the time of said application by said Nolans, and thence up to plaintiff's entry of the land, the public books and land-maps in the land office in Montgomery, Alabama, where said lands were enterable and where they were entered by plaintiff, relating to said lands, and showing and exhibiting the same, were marked in red ink with the capital letters I. R., and that the section on said maps, embracing the *locus in quo* was so marked, and that said mark stood for and meant Indian Reservation, and indicated that said entire section was reserved and set apart to Creek Indians under said treaty, and was so understood in said land offices, and by every one inspecting said maps and books, and that said map was open to the inspection of the public.

It was further proved that said Nolans, about the last of the year 1834, sold all their said pre-emption claims to said Howard, who paid them a valuable consideration therefor, and the same year took possession of said lands, and claiming them as his own, held and cultivated them thereafter till his sale to defendant, McTyer.

The plaintiff, in reply, proved that said lands were, in 1847, offered for sale under the act of Congress, approved August 3d, 1846, and under instructions from the commissioner of the general land office to the land-officers in Montgomery, by which instructions said land officers in Montgomery were ordered to offer at public sale the lands sued for, if, after a careful examination of the books and maps in their offices, there appeared on them no objection to offering said lands for sale. It was conceded that said lands were never offered at public sale by the government, except under the act and instructions above mentioned. The plaintiff also introduced copies from the land office books at Washington, containing a statement or memorandum that a pre-emption certificate had been issued in the year A. D. 1842, in favor of Daniel Nolan, for the east half of the north-west quarter of said section; another in favor of John and Daniel Nolan, for the west half of the north-east quarter of same section, and another in favor of James Nolan, for the

west half of the south-east quarter of same section, and that east half of the south-east quarter 32, 10, 29, was located to Kotchimicho, an Indian. Said Nolans, who were witnesses for defendant, swore that neither of them had ever applied for, received, or accepted from the government any certificate, patent, or other evidence of title to any land in said section, nor ever got any other land in lieu of their said pre-emption claims. Before the introduction in evidence of said copies of memorandum or statement, the defendant objected to their introduction in evidence, if offered to prove the Nolan's relinquishment of pre-emption to the lands in suit, or if offered to prove that the Nolan's, or any of them, had in fact entered as pre-emptors the lands specified in the memorandum, but though offered with such view the Court overruled the objection, and admitted said copies in evidence. Defendant also offered in evidence a copy of the original map on file in the Department of Indian Affairs, at Washington City, embracing the said section 32, T. 10, R. 29, in Barbour county, Alabama, and all the lands in suit, in which the whole section embracing the land sued for was colored with red, and the land sued for, and the whole of said section 32, were so colored with red, and accompanying said map, were the certificates following, to wit:

"DEPARTMENT OF THE INTERIOR,
INDIAN AFFAIRS, August 22d, 1856.

I, Charles E. Mix, acting Commissioner of Indian Affairs, do hereby certify that the above is a correct extract from the map exhibiting the location of Creek lands in the State of Alabama, under the treaty of March, 1832, that said extract designates township 10, range 29, and that portion colored in red was assigned by Col. Abert to Creek Indian reservees.

CHARLES E. MIX,
Acting Commissioner.

"UNITED STATES OF AMERICA.

I, Robert McClelland, Secretary of the Interior, do hereby certify that Charles E. Mix, whose signature is annexed to the foregoing certificate, is now and was, at the time of signing the same, acting Commissioner of Indian Affairs, and that full faith and credit are due to his official acts as such.

In testimony whereof, I have hereunto set my hand and caused the seal of said department to be affixed this 22d day of August, 1856.

R. McCLELLAND, Secretary."

To which certificate plaintiff objected, on the ground that the keeper of the map could only certify to the truth of the copy, and could not certify that the land colored in red were Indian reserva-

tions, or that the red coloring meant Indian reservation; which objection the Court sustained, and excluded said map and certificates, and the defendant excepted.

This being all the evidence in the cause, the defendant asked the Court to charge that good objections to the offering the lands in question for sale, appeared on the books and maps of the land office in Montgomery, at and before the advertising and offering the same for sale, then the offering for sale was unauthorized; which charge the Court refused to give.

2. The defendant asked the Court to charge the jury, that if they believed the evidence in relation to the lands being marked I. R., and in relation to its being Indian reservation, and in relation to the evidence thereof existing in the land offices in Montgomery, then they may find that good objections to offering the lands in question for sale, did appear on the land maps in the land office in Montgomery, at and before the advertising and offering said land for sale; which charge the Court refused to give.

3. The defendant asked the Court to charge the jury, that if the offering by the government officers of the lands in question at public sale was unauthorized, then the same was not subject to private entry, and the patent is void as against McTyer, if, at the time of the entry, he was in adverse possession under bona fide color of title; and if the jury find the offering for sale unauthorized, and if they further find defendant, McTyer, was in actual possession under bona fide color of title, then the jury must find for the defendant; which charge the Court refused to give.

4. The defendant asked the Court to charge the jury, that if they believed all the evidence they must find that the land in dispute was set apart to an Indian reservee, under the treaty of 1832, and if so, they may find for the defendant; which charge the Court refused to give.

5. Defendant asked the Court to charge the jury, that if they find there was no Indian reservation, and if they further find that the Nolans, or some of them, acquired a pre-emption right to the land sued for, or some of it, and offered to make proof and pay the purchase-money for the same, and to do all the law required to perfect their title, and were by the land officers to do so, because of the land being Indian reservation, or of their saying or believing so, then as to the land in that predicament the plaintiff is not entitled to recover; which charge the Court refused to give, and charged that in order to invest the Nolans with such legal title as would defeat the plaintiff's patent, they must have actually paid the money and received a certificate.

6. The defendant asked the Court to charge the jury, that if Howard bought the *locus in quo* from the Nolans, and if McTyer, at and before the time of plaintiff's entry, was in actual possession thereof, under bona fide color of title, for which he had paid a valu-

able consideration, then the plaintiff's entry of the land was irregular, and as against McTyer the patent is void; which charge the Court refused to give.

7. Defendant asked the Court to charge the jury, that if they believed the evidence in relation to the right of pre-emption in the Nolans, then they must find for the defendant; which charge the Court refused to give.

8. The defendant asked the Court to charge the jury, that if they believed the evidence in relation to the lands in controversy being an Indian reservation, they must find for defendant; which charge the Court also refused to give.

9. Defendant asked the Court to charge the jury, that if they believed all the evidence, they must find for defendant; which charge the Court refused to give.

To all of which rulings as to the introduction of evidence, refusals to charge, and charges given, defendant by his counsel excepted, and now tenders this bill, praying the Court may sign, seal, and make the same a part of the record, which is done in term time by consent.

C. W. RAPIER, [SEAL.]
Judge Sixth Circuit, Presiding.

I agree to this bill as stating the facts.

J. COCHRAN.

And the notice of appeal in said case is as follows:

THE STATE OF ALABAMA, BARBOUR COUNTY. } To any sheriff of said State to execute and return.

THOMAS C. McDOWELL *vs.* ROBERT A. McTYER. } To said Thomas C. McDowell, or to Cochran & Bullock, his attorneys.

Take notice, that said cause in which, at the fall term, 1856, of the Circuit Court of said county, said Thomas C. McDowell recovered a judgment against said Robert A. McTyer, for the possession of land which has been taken by said Robert A. McTyer to the Supreme Court of said State by appeal, returnable to the next term thereof, to be holden at Montgomery, on the first Monday in January next.

Witness John C. McNab, Clerk of said Circuit Court, at office, this 29th day of November, A. D. 1856.

JOHN C. McNAB, Clerk.

Issued 29th November, A. D. 1856.
Executed December 1, 1856.

J. W. CLARK, Sheriff.

McDOWELL *vs.* McTYER. } Circuit Court of Barbour County, Alabama.

We bind ourselves security for costs in the Supreme Court in the above stated case.

Witness our hands and seals this, the 6th January, 1857.

J. BUFORD. [SEAL.]
By his attorney-in-fact, H. D. Clayton.
H. D. CLAYTON. [SEAL.]

Approved January 6th, 1857.

J. C. McNAB, Clerk.

THE STATE OF ALABAMA, Barbour County. }

I, John C. McNab, Clerk of the Circuit Court of said county, hereby certify that the foregoing seven pages contain a full, true, and correct transcript of said case of Thomas C. McDowell *vs.* Robert A. McTyer, as the same remains of record in my office; and further certify, that on the 29th day of November, A. D. 1856, an appeal was taken to the Supreme Court of the State in said case, by the defendant, Robert A. McTyer, and also certify that Jefferson Buford and Henry D. Clayton, of said county, are security for costs of the appeal.

Witness my hand and seal of office, this, the 6th day of January, A. D. 1857.

[SEAL.] JOHN C. McNAB, Clerk.

And on said transcript of the record so filed, the following errors were assigned, to wit:

Supreme Court, January Term, 1860.

The appellant comes by his attorney, and says there is error in the record, and assigns for error,

1. The refusals of the Circuit Court to charge as asked by the defendant, and the charges given by the Court as set out in the Bill of Exceptions.

2. The refusal of the Court to sustain defendant's objection to the evidence offered by plaintiff, of the Nolans having obtained lands under the pre-emption laws in 1841, as stated in the Bill of Exceptions; also the rejection of the evidence offered by defendant, as mentioned in the Bill of Exceptions.

3. The judgment entry.

4. The matters set out in the Bill of Exceptions.

J. L. PUGH,
Attorney for Appellant.

The following proceedings were had in the Supreme Court, to wit:

Friday, February 27th, 1857.

ROBERT A. McTYER
vs. 4,291–2 Div. } Continued by consent.
THOMAS C. McDOWELL.

Wednesday, June 17th, 1857.

ROBERT A. McTYER
vs. 4,291–2 Div.
THOMAS C. McDOWELL.

Comes J. L. Pugh, Esq., one of the attorneys of this Court, and suggests the death of said Thomas C. McDowell, the appellee in this case, since the last term of this Court, and on motion of the appellant it is ordered by the Court that a *scire facias* be issued to the heirs and personal representatives of said deceased, when known, to show cause why they should not be made parties defendants to this appeal.

Wednesday, February 17th, 1858.

ROBERT A. McTYER
vs. 4,291–2 Div.
THOMAS C. McDOWELL.

Came the parties by their attorneys, and it having been shown at the last term to the satisfaction of the Court, that Thomas C. McDowell, the appellee, has departed this life since the appeal was taken, it is ordered by the Court, on the motion of the appellant, that this suit be revived as against Edward C. Bullock, administrator of said deceased, Martha Sanderford, wife of Samuel Sanderford, Matilda Watts, wife of John B. Watts, Margaret A. McDowell, Caroline McDowell, Antonette McDowell, Virginia McDowell, James McDowell, and Cornelius Robison, Charles C. Robison, William F. Robison, Mary A. Robison, Margaret Robison, and Sarah E. Robison, minors, by Edward C. Bullock, guardian *ad litem*, the heirs-at-law of said Thomas C. McDowell. It is further ordered that this cause be continued until the next term of this Court.

Thursday, June 9th, 1859.

ROBERT A. McTYER
vs. 4,291–2 Div.
EDWARD C. BULLOCK, adm'tor, &c., et als.

Came the parties by their attorneys, and the record and the matters assigned for error therein being argued and examined, it seems to the Court that in the record and proceedings of said Circuit Court of Barbour county, there is no error.

It is therefore considered by the Court, that the judgment of said Circuit Court be in all things affirmed, and that said appellees recover of said appellant, and of Jefferson Buford, and Henry D. Clayton, sureties for the costs of the appeal, the costs accruing on said appeal in this Court and in said Circuit Court.

Wednesday, August 3d, 1859.

ROBERT A. McTYER
vs. 4,291-2 Div.
EDWARD C. BULLOCK, adm'tor, et als.

The application by the appellant for a rehearing in this case, having been heard and examined by the Court, it is considered that the same be annulled.

[Writ of Error Bond.]

UNITED STATES OF AMERICA:

Know all men by these presents, that we, John H. Howard, James W. Warren, and John A. Jones, are held and firmly bound unto Edward C. Bullock, administrator of Thomas C. McDowell, deceased, Martha Sanderford, wife of Samuel Sanderford, Matilda Watts, wife of John B. Watts, Margaret A. McDowell, Caroline McDowell, Antonette McDowell, Virginia McDowell, James McDowell, Cornelius Robison, Charles C. Robison, William F. Robison, Mary A. Robison, Margaret Robison, and Sarah E. Robison, in the sum of one thousand dollars, to be paid to the said Edward C. Bullock, administrator, &c., and others, their executors and administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 20th day of November, A. D. 1860.

The condition of the above obligation is such, that whereas, Robert A. McTyer has prosecuted a Writ of Error to the Supreme Court of the United States, to reverse a judgment or decree rendered by the Supreme Court of the State of Alabama, in a certain cause-in-law in which Robert A. McTyer was the plaintiff or appellant, and the said Edward C. Bullock, administrator, &c., *et als.*, was defendants or appellees. Now, if the said above-named Robert A. McTyer shall prosecute his said Writ of Error to effect,

and answer all damages and costs if he fail to make good his plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Signed, sealed, and delivered in presence of Peyton H. Colquilt, Josephus Echoles.

J. H. HOWARD,
J. W. WARREN,
JOHN C. JONES,
A. R. BELL.

Approved by me, this 28th November, 1860.

A. J. WALKER,
Chief Justice of the Supreme Court of Alabama.

Filed November 28th, 1860.

JNO. D. PHELAN,
Clerk Supreme Court, Alabama.

THE STATE OF ALABAMA,
Montgomery County.

I, John D. Phelan, Clerk of the Supreme Court of the State of Alabama, do hereby certify that the foregoing pages, from one to ten inclusive, contain a full, true, and correct transcript of the record in the case therein named, from the Circuit Court of Barbour county, as the same appears on file in my office; of the proceedings had in said cause in said Supreme Court, and of the Writ of Error Bond, as the same remains on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the Court, this 1st day of December, A. D. 1860.

JNO. D. PHELAN,
Clerk Supreme Court of Alabama.

[Writ of Error.]

UNITED STATES OF AMERICA, *ss*:

The President of the United States,

[SEAL.] To the Honorable the Judges of the Supreme Court of the State of Alabama, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, between Robert A. McTyer, plaintiff or appellant, and Edward A. Bullock, administrator of Thomas C. McDowell, deceased, *et als.*, defendants or appellees, a manifest error hath happened, to the great damage of the said Robert A. McTyer, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States,

together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court, this first Monday of December, in the year of our Lord one thousand eight hundred and fifty-nine.

WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.
Allowed by A. J. WALKER,
Chief Justice of the Supreme Court of Alabama.

[Citation.]

THE UNITED STATES OF AMERICA,

To Edward C. Bullock, administrator of Thomas C. McDowell, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a Writ of Error filed in the clerk's office of the Clerk of the Supreme Court of Alabama, wherein Robert A. McTyer is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable A. J. Walker, Chief Justice of the Supreme Court of the State of Alabama, this 16th day of November, in the year of our Lord one thousand eight hundred and sixty.

A. J. WALKER, Chief Justice.